IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 108 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

JJJJ

Date of decision: 19/09/2000

ORAL JUDGEMENT

(per A.R. Dave, J.)

At the instance of the assessee, for the Assesment Years 1977-78 and 1978-79, the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred to this Court the following questions under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

The questions arising out of the order of the Tribunal for the Assessment Year 1977-78 are the following :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in fixing the value of perquisite at 3/4th of Rs. 13,500/- in spite of the fact that the annual letting value in the case of the owner company was estimated at Rs. 1835/-"

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in deciding the contribution to partnership as 'transfer' for consideration within the meaning of sec. 2(47) of the Income-tax Act, 1961 so as to uphold the levy of capital gains u/s 45 of the I.T. Act?"

Similarly, for the Assessment Year 1978-79, the following

two questions have been referred to this court at the

instance of the assessee:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in fixing the value of perquisite at Rs. 13,500/- in spite of the fact that the Annual Letting Value in the case of the company was estimated at Rs. 1835/-?"

2. Whether contribution to partnership is 'transfer' within the meaning of section

45 of the Act, and alleged capital gain is liable to be included in taxable income of the appellant and whether it is for consideration?"

2. Question No. 1 in both the assessment years is raising a common question of law and, therefore, the said question is decided by a common answer.

3. Learned Advocate Shri R.K. Patel appearing for the assessee has submitted that at the time of hearing of the appeal before the tribunal, the assessee's representative had relied upon the case decided in favour of Suhrid Sarabhai for the Assesment Year 1975-76, but at the time of the hearing, the assessee's representative had not placed on record a copy of the judgment delivered in that case. In the circumstances, in our opinion, no fault can be found with the tribunal's findings. Moreover, upon perusal of the relevant orders passed by the tribunal, it is very clear that the annual letting value, which was considered by the tribunal, was on the basis of valuation arrived at by the municipal authorities. Looking to the fact that the valuation, which was arrived at by the municipal authorities, was considered by the tribunal, in our opinion, the tribunal had rightly decided that annual letting value of the property at Rs. 13,500/- and 3/4th of the said amount was treated as perquisite in both the assessment years. In the circumstances, the first question in both the assessment years is decided in favour of the revenue and against the assessee.

So far as the second question for the A.Y. 1977-78 is concerned, it has been submitted by the learned advocate appearing for the assessee that through oversight the said question has been raised though, in fact, the said question had never been raised before the tribunal at the time of hearing of the appeal. In the circumstances, as the said question has been proposed only on account of inadvertence, we decline to answer the said question.

So far as the second question raised before this court, which pertains to A.Y. 1978-79, it relates to transfer of an asset by a partner of the firm to the partnership firm. The question is with regard to calculation of the capital gain in the case where an asset is transferred by one of the partners of the firm to the partnership firm.

Our attention has been drawn to the case decided by the Supreme Court in the case of Kartikeya Sarabhai v. CIT, 156 ITR 509. It has been held by the Supreme Court in the said case that normally the Assessing Officer has to find out whether the transfer in such a case is genuine and whether the transfer is only with an intention to avoid tax liability. Moreover, it has also to be examined whether the firm is genuine. It appears that such an exercise has not been done. In the circumstances, we are of the view that it would be appropriate for the Assessing Officer to determine the said facts in the light of the judgment of the Supreme Court referred to hereinabove.

In the circumstances, we direct the Assessing Officer to look into it as observed by the Supreme Court in the case of Kartikeya Sarabhai (supra) and decide the case accordingly after ascertaining the genuineness with regard to the transaction.

The reference stands disposed of accordingly with no order as to costs.

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(D.M. Dharmadhikari, C.J.)

(A.R. Dave, J.)

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